



DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

Surface Transportation Project Delivery Program; Utah Department of Transportation Audit Report

[FHWA Docket No. FHWA-2020-0012]

AGENCY: Federal Highway Administration (FHWA), Department of Transportation (DOT).

ACTION: Notice.

SUMMARY: The Moving Ahead for Progress in the 21st Century Act (MAP-21) established the Surface Transportation Project Delivery Program that allows a State to assume FHWA's responsibilities for environmental review, consultation, and compliance under the National Environmental Policy Act (NEPA) for Federal highway projects. When a State assumes these Federal responsibilities, the State becomes solely responsible and liable for carrying out the responsibilities it has assumed in lieu of FHWA. This program mandates annual audits during each of the first 4 years of State participation to ensure compliance with program requirements. This notice finalizes the findings of the third audit report for the Utah Department of Transportation (UDOT).

FOR FURTHER INFORMATION CONTACT: Mr. David Cohen, Office of Project Development and Environmental Review, (202) 366-8531, David.Cohen@dot.gov, or Mr. Patrick Smith, Office of the Chief Counsel, (202) 366-1345, Patrick.C.Smith@dot.gov, Federal Highway Administration, U.S. Department of Transportation, 1200 New Jersey Avenue, SE, Washington, DC 20590. Office hours are from 8:00 a.m. to 4:30 p.m., e.t., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Electronic Access

An electronic copy of this notice may be downloaded from the specific docket page at www.regulations.gov.

Background

The Surface Transportation Project Delivery Program, codified at 23 United States Code (U.S.C). 327, commonly known as the NEPA Assignment Program, allows a State to assume FHWA's environmental responsibilities for review, consultation, and compliance for Federal highway projects. When a State assumes these Federal responsibilities, the State becomes solely liable for carrying out the responsibilities in lieu of the FHWA. The UDOT published its application for NEPA assumption on October 9, 2015, and made it available for public comment for 30 days. After considering public comments, UDOT submitted its application to FHWA on December 1, 2015. The application served as the basis for developing a Memorandum of Understanding (MOU) that identifies the responsibilities and obligations that UDOT would assume. The FHWA published a notice of the draft MOU in the Federal Register on November 16, 2016, with a 30-day comment period to solicit the views of the public and Federal agencies. After the end of the comment period, FHWA and UDOT considered comments and proceeded to execute the MOU. Effective January 17, 2017, UDOT assumed FHWA's responsibilities under NEPA, and the responsibilities for other Federal environmental laws described in the MOU.

Section 327(g) of Title 23, U.S.C., requires the Secretary to conduct annual audits during each of the first 4 years of State participation. After the fourth year, the Secretary shall monitor the State's compliance with the written agreement. The results of each audit must be made available for public comment. This notice finalizes the findings of the third audit report for UDOT participation in the NEPA Assignment program. The FHWA published a draft version of this report in the Federal Register on September 17, 2020, and made it available for public review and comment for 30 days in accordance

with 23 U.S.C. 327(g). The FHWA received one response to the Federal Register notice during the public comment period for the draft report. The only response, from the American Road and Transportation Builders Association, outlined their general support for the NEPA Assignment program to accelerate Federal-aid highway program and project delivery. The FHWA determined that the comment required no changes to the draft report. This notice finalizes the third NEPA Assignment audit report in Utah.

Authority: Section 1313 of Public Law 112-141; Section 6005 of Public Law 109-59; 23 U.S.C 327; 23 CFR 773.

Stephanie Pollack,
Acting Administrator,
Federal Highway Administration.

**Surface Transportation Project Delivery Program
FHWA Audit of the Utah Department of Transportation – Final Report
July 1, 2018 – June 30, 2019**

Executive Summary

This report summarizes the results of the Federal Highway Administration’s (FHWA) third audit of the Utah Department of Transportation’s (UDOT) National Environmental Policy Act (NEPA) review responsibilities and obligations that FHWA assigned and UDOT assumed pursuant to 23 United States Code (U.S.C.) 327.

Throughout this report, FHWA uses the term “NEPA Assignment Program” to refer to the program codified at 23 U.S.C. 327. Pursuant to 23 U.S.C. 327, UDOT and FHWA executed a memorandum of understanding (MOU) on January 17, 2017, to memorialize UDOT’s NEPA responsibilities and liabilities for Federal-aid highway projects and certain other FHWA approvals in Utah. The section 327 MOU covers environmental review responsibilities for projects that require the preparation of environmental assessments (EA), environmental impact statements (EIS), and non-designated documented categorical exclusions (DCE). A separate MOU, pursuant to 23 U.S.C. 326, authorizes UDOT’s environmental review responsibilities for other categorical exclusions (CE), commonly known as CE Program Assignment. The scope of this audit did not include the CE Program Assignment responsibilities and projects.

As part of FHWA’s review responsibilities under 23 U.S.C. 327, FHWA formed a team (the “Audit Team”) in June 2019 to plan and conduct an audit of NEPA responsibilities UDOT assumed. The Audit Team conducted an on-site review during the week of October 7 to October 10, 2019. Prior to the on-site visit, the Audit Team reviewed UDOT’s NEPA project files, UDOT’s response to FHWA’s pre-audit information request (PAIR), UDOT’s NEPA Assignment Self-Assessment Report, UDOT’s NEPA Quality Assurance/Quality Control (QA/QC) Guidance, and UDOT’s NEPA Assignment Training Plan. The Audit Team conducted interviews with four

members of UDOT central office staff, three of UDOT's legal counsel (one Assistant Attorney General (AG) assigned to UDOT and two outside counsel), and seven staff members from the U.S. Army Corps of Engineers (USACE) as part of this on-site review.

Overall, the Audit Team found that UDOT continues to carry out the assigned environmental review and transportation decisionmaking responsibilities successfully. The UDOT has made efforts to respond to the FHWA findings from the second audit, including improving document management and QA/QC procedures. In the first and second audits, the FHWA Audit Team observed inconsistent understanding of QA/QC procedures among UDOT staff and lack of adherence to its QA/QC procedures. In the third audit, the Audit Team found that UDOT issued an environmental document without a final legal sufficiency finding, and observed that there were some ways UDOT could improve their training.

The Audit Team identified one non-compliance observation and one observation as well as several successful practices. The Audit Team found UDOT has been carrying out the responsibilities it has assumed in compliance with the provisions of the Section 327 MOU.

Background

The NEPA Assignment Program allows a State to assume FHWA's environmental responsibilities for review, consultation, and compliance for Federal-aid highway projects and certain other FHWA actions. Under 23 U.S.C. 327, a State that assumes these Federal responsibilities becomes solely responsible and solely liable for carrying them out. Effective January 17, 2017, UDOT assumed FHWA's responsibilities under NEPA and other Federal environmental laws. Examples of responsibilities UDOT

has assumed in addition to NEPA include section 7 consultation under the Endangered Species Act and consultation under section 106 of the National Historic Preservation Act.

After this third audit, FHWA conducted the fourth and last annual audit in November 2020 to satisfy provisions of 23 U.S.C. 327(g) and Part 11 of the MOU. Audits are the primary mechanism through which FHWA may oversee UDOT's compliance with the MOU and the NEPA Assignment Program requirements. This includes ensuring compliance with applicable Federal environmental laws and policies, evaluating UDOT's progress toward achieving the performance measures identified in MOU Section 10.2, and collecting information needed for the Secretary's annual report to Congress. The FHWA must present the results of each audit in a report and make it available for public comment in the Federal Register.

The Audit Team consisted of NEPA subject matter experts from the FHWA Utah Division as well as additional FHWA Division staff from California, Georgia, Alaska, and FHWA Headquarters. The subject matter experts received training on how to assess UDOT's compliance and assess the levels of accomplishment associated with the implementation of the NEPA Assignment Program in Utah.

Scope and Methodology

The MOU (Part 3.1.1) states that “[p]ursuant to 23 U.S.C. 327(a)(2)(A), on the Effective Date, FHWA assigns, and UDOT assumes, subject to the terms and conditions set forth in 23 U.S.C. 327 and this MOU, all of the USDOT Secretary's responsibilities for compliance with the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.* with respect to the highway projects specified under subpart 3.3. This assignment includes statutory provisions, regulations, policies, and guidance related to the implementation of NEPA for highway projects such as 23 U.S.C. 139, 40 CFR parts 1500-1508, DOT Order 5610.1C, and 23 CFR 771 as applicable.” Also, the performance measure in MOU Part 10.2.1(A) for compliance with NEPA and other Federal

environmental statutes and regulations commits UDOT to maintaining documented compliance with requirements of all applicable statutes and regulations, as well as provisions in the MOU.

The Audit Team conducted an examination of UDOT's NEPA project files, UDOT's responses to the PAIR, and UDOT's self-assessment. The audit also included interviews with staff and reviews of UDOT policies, guidance, and manuals pertaining to NEPA responsibilities. All reviews focused on objectives related to the six NEPA Assignment Program elements: program management; documentation and records management; QA/QC; legal sufficiency; training; and performance measurement.

The focus of the audit was on UDOT's process and program implementation. Therefore, while the Audit Team reviewed project files to evaluate UDOT's NEPA process and procedures, the Audit Team did not evaluate UDOT's project-specific decisions to determine if they were, in FHWA's opinion, appropriate or not. The Audit Team reviewed 11 NEPA Project files with DCEs, EAs, and EISs, representing all projects with decision points or other actionable items between July 1, 2018, and June 30, 2019. The Audit Team also interviewed environmental staff in UDOT's headquarters office.

The PAIR consisted of 26 questions about specific elements in the MOU. The Audit Team used UDOT's response to the PAIR to develop specific follow-up questions for the on-site interviews with UDOT staff.

The Audit Team conducted four in-person interviews with UDOT environmental staff, one in-person interview with seven staff members of the USACE, two phone interviews with UDOT's outside legal counsel, and one phone interview with legal counsel from the Utah Attorney General's office.

Throughout the document reviews and interviews, the Audit Team verified information on the UDOT NEPA Assignment Program including UDOT policies,

guidance, manuals, and reports. This included the NEPA QA/QC Guidance, the NEPA Assignment Training Plan, and the NEPA Assignment Self-Assessment Report.

The Audit Team compared the procedures outlined in UDOT environmental manuals and policies to the information obtained during interviews and project file reviews to determine if there were discrepancies between UDOT's performance and documented procedures. The Audit Team documented observations under the six NEPA Assignment Program topic areas. Below are the audit results.

Overall, UDOT successfully carried out the environmental responsibilities it had assumed through the MOU and the application for the NEPA Assignment Program, and, as such, the Audit Team found UDOT was substantially compliant with the provisions of the MOU.

Observations and Successful Practices

This section summarizes the Audit Team's observations of UDOT's NEPA Assignment Program implementation, including successful practices UDOT may want to continue or expand. Successful practices are positive results FHWA would like to commend UDOT for developing. These may include ideas or concepts that UDOT has planned but not yet implemented. Observations are items the Audit Team would like to draw UDOT's attention to, which may benefit from revisions to improve processes, procedures, or outcomes. The UDOT may have already taken steps to address or improve upon the Audit Team's observations, but at the time of the audit, they appeared to be areas where UDOT could make improvements. This report addresses all six MOU topic areas as separate discussions. Under each area, this report discusses successful practices followed by observations.

This audit report provides an opportunity for UDOT to implement actions to improve their program. The FHWA considered the status of areas identified for potential improvement in this audit's observations as part of the scope of Audit #4. The fourth

audit report will include a summary discussion that describes UDOT's progress since this third audit.

Program Management

Successful Practices

During the kickoff meeting, the Audit Team learned that UDOT has placed the Environmental Services Division under Program Development rather than Project Development. This re-organization helped environmental services align their work with planning staff. The UDOT described their interest in advancing a linking planning and environment approach related to their corridor planning process. The UDOT plans to pilot this approach on some corridors studies. Implementing this linking planning and environment approach could help address new environmental requirements and initiatives to accelerate project delivery. The FHWA and UDOT jointly discussed the opportunity and potential benefits that could result from hosting a peer exchange on this subject. In interviews with the USACE, the Audit Team learned that they have had recent discussions with UDOT about this type of approach.

Within the last auditing period, UDOT initiated bi-monthly meetings with USACE to discuss upcoming projects. Early coordination with interested agencies can be effective in early identification and resolution of issues, and help to accelerate project delivery. The USACE supports continuing these early coordination efforts. In addition, USACE noted that UDOT's project managers were diligent and effective in documenting discussions in meetings and sending project-specific meeting notes to them for review and concurrence.

Through interviews with USACE, the Audit Team learned that UDOT had consistently monitored the effectiveness of its wetland mitigation as required for permits issued by USACE under Section 404 of the Clean Water Act, and they sent timely and complete monitoring reports to the USACE.

The UDOT uses varying methods of communication for its public involvement, which UDOT customizes to the context of each project and the surrounding community. Communication methods include, but are not limited to, one-on-one discussions with the public, emails and phone calls UDOT receives from the public through project Websites, neighborhood gatherings, and placing door hangers throughout communities. Public involvement plans evolve throughout the NEPA process, and UDOT environmental and public involvement staff meet as a team to decide how to address public concerns as they arise. Through interviews, the Audit Team learned that UDOT is exploring the use of virtual public involvement strategies on some of its projects, such as the use of videos and mapping tools, as a means of further enhancing public engagement.

Documentation and Records Management

Successful Practices

The UDOT continues to improve implementation of its project file system. The UDOT uses ProjectWise as its environmental file system of record for NEPA Assignment Program projects. The folder structure in ProjectWise outlines the potential components of a complete project file that consultants and staff should populate, and UDOT's Environmental Document File Management guidance explains methods for organizing project files. In addition, the Environmental Performance Manager reviews project folders in ProjectWise to ensure that all project files are organized in accordance with the file structure. These measures have noticeably improved the organization and completeness of project files since the first two audits.

Quality Assurance/Quality Control

Successful Practices

The Audit Team learned through the PAIR response and interviews that, in response to Audit #2, UDOT had revised the Environmental Document Review Tool to differentiate requirements for EAs and EISs. The UDOT had also created a new

checklist for QA/QC. In interviews, UDOT staff recognized that they may need to further revise procedures to ensure documentation is complete, and stated that they are committed to continuing to revise and implement their process to document legal sufficiency findings on all documents requiring findings in accordance with UDOT's Manual of Instruction (MOI) and QA/QC plan. The UDOT staff's weekly project meetings, as well as their biweekly meetings to talk about issues that arise in the environmental program, are ways they can continue to refine their processes.

Legal Sufficiency

Successful Practice

The UDOT Environmental Managers work directly with outside counsel. The UDOT Environmental Managers, an Assistant AG, and outside counsel hold quarterly meetings during which UDOT apprises counsel of upcoming project reviews and anticipated review deadlines. These quarterly meetings are one of UDOT's strategies for keeping the Assistant AG assigned to UDOT apprised of all communications between UDOT staff and outside counsel

Training

Observation #1

The UDOT continues to update its training plan on an annual basis, as required under Section 12.2 of the MOU. During the audit period UDOT provided its staff 12 training opportunities on NEPA and other environmental requirements, in accordance with the training plan. Section 12.2 of the MOU states that "UDOT and FHWA, in consultation with other Federal agencies as deemed appropriate, will assess UDOT's need for training and develop a training plan." During interviews, however, USACE, staff stated they have not had the opportunity to provide input on UDOT's training plan. The USACE expressed that their staff may benefit from training to better understand UDOT's highway design standards, requirements, and policies. Interagency discussions regarding

training needs may identify opportunities for cross-training with the potential to improve interagency communication and coordination, and lead to more efficient permit review and consultation processes.

Performance Measures

Successful Practices

The UDOT's self-assessment documented the performance management details of the NEPA Assignment Program in Utah, which demonstrates UDOT's procedures under NEPA assignment have resulted in a reduction in the time needed to complete DCEs, EAs, and EISs. The average time to complete environmental documents is 7 months for DCEs, 24 months for EAs, and 37 months for EISs. Although these data are based on a limited number of completed UDOT NEPA reviews since January 2017, UDOT's initial timeliness results are promising.

The UDOT regularly updates their MOI to continuously improve their policies and procedures. During this audit period, UDOT updated their MOI in September 2018. The UDOT has polled resource agencies every year to get feedback on their performance. The UDOT's self-assessment documents that, although they had a lower response rate to their annual resource agency poll this year (24 percent) compared to last year (50 percent), the overall evaluation rating is 4 percent higher than the ratings prior to NEPA assignment. The UDOT recognized that the low response rate may be due to timing (UDOT sent the surveys in the summer and allowed 2 weeks for responses). In interviews with the USACE, the Audit Team heard that the distribution method may also be a factor. The USACE suggested that UDOT find a way to give the survey more visibility (e.g., discuss it at the bimonthly meeting, phone call in advance of the email, have it come from someone they work with regularly).

Non-Compliance Observation

Non-compliance observations are instances where the Audit Team found UDOT was out of compliance or deficient in proper implementation of a Federal regulation, statute, guidance, policy, the terms of the MOU, or UDOT's own procedures for compliance with the NEPA process. Such observations may also include instances where UDOT has failed to maintain technical competency, adequate personnel, and/or financial resources to carry out the assumed responsibilities. Other non-compliance observations could suggest a persistent failure to adequately consult, coordinate, or consider the concerns of other Federal, State, Tribal, or local agencies with oversight, consultation, or coordination responsibilities. The FHWA expects UDOT to develop and implement corrective actions to address all non-compliance observations.

The following non-compliance observation relates to UDOT not complying with the State's environmental review procedures.

Non-Compliance Observation #1- Issuing a document without final legal sufficiency finding

As noted in UDOT's Self-Assessment and confirmed through audit interviews and project file reviews, the Audit Team learned that in the case of one project's individual Section 4(f) evaluation, while outside counsel reviewed and commented on the draft evaluation prior to its release, the project file contained no documentation demonstrating that the required legal sufficiency review was completed pursuant to 23 CFR 771.125(b) and/or 23 CFR 774.7(d) prior to UDOT's approval of the evaluation. This was also not in accordance with UDOT's QA/QC plan, Section 4.1.B, which requires the reviewing attorney provide the Environmental Program Manager with written documentation that the legal sufficiency review has been completed. The UDOT's response to the draft audit report indicated that they have since implemented a standard checklist form, to be completed by legal counsel, to document their project review to clarify the documentation of legal sufficiency reviews.

Response to Public Comments on the Draft Report and the Final Report

The FHWA received one comment from the American Road & Transportation Builders Association (ARTBA) in general support of UDOT's implementation of the NEPA Assignment Program to accelerate Federal-aid highway program and project delivery in Utah. The FHWA appreciates ARTBA's input and determined that there is no need to revise the draft audit report in response to ARTBA's comment. Therefore, FHWA is finalizing UDOT's third NEPA Assignment audit report with this Federal Register notice.

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